80-1529

No. .....

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Supreme Court of the United States

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

JOHN MacKENZIE,

Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW YORK, SUPREME COURT

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Question Presented

May a state under its own Constitution prohibit a citizen from exercising his guaranteed federal constitutional right to proceed *pro se* during custodial questioning?

TABLE OF CONTENTS

	PAGE
Question Presented	1
Preliminary Statement	1
The Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	3
Statement of the Case	4
The Investigation and Apprehension of MacKenzie and Irby	6
The Search for MacKenzie	8
Defendant's Case	12
The Decisions of the State Courts	13
Reasons for Granting the Writ	15
The Supremacy Clause of the United States Constitution Requires that New York's *People* v. *Cunningham* Rule Be Declared Invalid and Void	17
The People Have Standing	18
Constitutional Right to Self-Representation	18
Conclusion	25
Appendices	
Appendix A—Nisi Prius Opinion	1a
Appendix B—Appellate Division Opinion	19a
Appendix C—Certificate Denying Leave	24a

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TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 17, 22
Alexander v. Smith, 582 F.2d 272 (2d Cir. 1978) 16

Brewer v. Williams, 430 U.S. 387 (1977) 21

Carter v. Illinois, 329 U.S. 173 (1946) 17, 19
Chapman v. Crane, 123 U.S. 540 (1887) 18
Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), *cert den.*, 424 U.S. 947 (1976) 19
Cooper v. Aaron, 358 U.S. 1 (1958) 18

Dunaway v. New York, 442 U.S. 200 (1979) 23

Fare v. C., 442 U.S. 707 (1979) 18
Faretta v. California, 422 U.S. 806 (1975) 17, 18, 20, 21, 24

Henry v. Rockhill, 376 U.S. 776 (1964) 18

Johnson v. New Jersey, 384 U.S. 719 (1966) 16
Johnson v. Zerbst, 304 U.S. 458 (1938) 21

Kennedy v. Fairman, 618 F.2d 1248 (7th Cir. 1980) 19

Michigan v. Mosley, 423 U.S. 96 (1975) 20, 21
Miranda v. Arizona, 384 U.S. 436 (1966) 15, 16, 24

Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) 19
North Carolina v. Butler, 441 U.S. 369 (1979) 18, 23

Oregon v. Haas, 420 U.S. 714 (1975) 18

People v. Alexander, 45 A.D.2d 1023 (2d Dept. 1974) 16
People v. Bodie, 16 N.Y.2d 275 (1965) 16

PAGE

People v. Cunningham, 41 N.Y.2d 203 (1980) 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25
People v. Davis, 49 N.Y.2d 114 (1979) 20
People v. Gary, 31 N.Y.2d 68 (1972) 16
People v. Huntley, 15 N.Y.2d 72 (1965) 24
People v. MacKenzie, 432 N.Y.S.2d 901 (2d Dept. 1980) 14, 15
People v. Prince, 50 N.Y.2d 883 (1980) 16

United States v. Grant, 549 F.2d 942 (4th Cir. 1977), *cert den.*, 432 U.S. 908 (1977) 19
United States v. Hauck, 586 F.2d 1296 (8th Cir. 1978), *cert den.*, 441 U.S. 947 (1979) 19
United States v. Henry, 100 S. Ct. 2183 (1980) 21
United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980) 19
United States v. Rodriguez-Gastellum, 569 F.2d 482 (9th Cir. 1978) (en banc), *cert den.*, 436 U.S. 919 (1978) 19

White v. Kinkbeiner, 611 F.2d 186 (7th Cir. 1979) 19

Statutes and Constitutional Provisions:

First Amendment to the Constitution of the United States 3, 19, 22, 25

Fifth Amendment to the Constitution of the United States 3, 14, 16, 19, 24

Sixth Amendment to the Constitution of the United States 3, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25

Fourteenth Amendment to the Constitution of the United States 3, 17, 19

28 U.S.C. sec. 1257 (3) 2

Article I, Section 6 of the New York State Constitution 3, 17, 22

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW YORK, SUPREME COURT

Preliminary Statement

Pursuant to a judgment of the County Court, Nassau County, rendered September 16, 1976, John MacKenzie was convicted after a jury trial of murder in the second degree (felony murder), manslaughter in the first degree, burglary in the second degree, grand larceny in the second degree, possession of a weapon in the third degree, possession of burglar's tools and unlawful possession of noxious material

and sentenced to concurrent sentences as follows: an indeterminate term of 25 years to life on the murder count, up to 25 years on the manslaughter, up to 15 years on the burglary, up to 7 years on the larceny and weapons counts, a definite term of 1 year on the charge of possession of burglar's tools and 90 days on the noxious materials charge.

The Opinions Below

At the conclusion of a suppression hearing conducted pursuant to a motion by defendant, the County Court of Nassau County, in a written opinion, denied the motion to suppress in all respects. The opinion is not reported (Appendix A). The opinion of the Appellate Division, which reversed the judgment of conviction and ordered a new trial is reported at —— A.D.2d ——, 432 N.Y.2d 901 (2d Dept. 1980) (Appendix B). The order of the New York Court of Appeals denying leave to appeal has not yet been reported (Appendix C).

Jurisdiction

Petitioner seeks certiorari to review an order of the Appellate Division of the Supreme Court of the State of New York dated November 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1257 (3). The order of the New York Court of Appeals denying leave is dated January 7, 1981.

Constitutional Provisions Involved

1. The First Amendment to the United States Constitution, which provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

2. The Fifth Amendment to the United States Constitution which provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

3. The Sixth Amendment to the United States Constitution which provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

4. The Fourteenth Amendment to the United States Constitution which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

5. New York State Constitution, Article 1, Section 6, which provides in pertinent part:

> "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel. . . ."

Statement of the Case

On October 7, 1975, at approximately 2:30 a.m., Police Officer **Hoffnecht**, on radio motor patrol, observed a suspicious car, a Cadillac, parked behind Thelma J.'s Boutique, Hempstead Avenue, Nassau County, a ladies' clothing store. Officer Hoffnecht drove up to the car and noticed the car's trunk bounce (H 1752).* The Cadillac was parked with its trunk facing the rear window of Thelma J.'s and the window was open. Police Officer Hoffnecht radioed for assistance (Police Officer Hoffnecht: H35-37, 1752; Det. Gulla: 51, 430).

Meanwhile, 16-year old **Michael Burns**, walking on Hempstead Avenue, across from Thelma J.'s, heard banging noises emanating from Thelma J.'s. The street was well lit with street lights, and Thelma J.'s had an outside light and the adjoining butcher store also had a light. Burns, standing 50 to 60 feet away, directed his attention toward Thelma J.'s, and observed a man peering out from behind Thelma J.'s door. The man was attempting to break out and Burns observed his full face from 20 to 30 seconds. Upon making eye contact with Burns however, the man ducked behind the door and disappeared. Burns noticed Police Officer Hoffnecht in the rear and informed him of what he had just observed. Officer Hoffnecht directed Burns to resume his observation across the street and yell if someone exited the store (Officer Hoffnecht and Michael Burns: H37-38, 45, 999-1004).

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* "H" refers to minutes of Suppression Hearing. Where the text is taken from the testimony of more than one witness, the names of the witnesses whose testimony is relied upon are also included. Where in the narrative a witness's name first appears, the name will appear in bold type.

Next Officer **Hayes** arrived.* While the two officers were in the rear, co-defendant Colleen Irby suddenly emerged from the shadows by the Cadillac. When asked what she was doing there, Irby claimed that she was looking for her calico cat. Now Police Officer Matthew Giglio arrived driving a police ambulance. Officer Hoffnecht directed Police Officer Giglio to cover the front. Police Officer Giglio left and Officer Hayes and Hoffnecht continued questioning Irby.

Returning to the front, Michael Burns, who was watching Thelma J.'s, was joined by another civilian [Louis Ewanitsko]. Police Officer Giglio was by the front of the store. At that time the man inside the store "staggered" out and away from Officer Giglio. Officer Giglio was trying to stop him by having the man place his hands up against the building wall. Suddenly the man's right hand came down to waist level and Burns heard a shot and observed the Police Officer fall. The man fled. Burns stated in court that MacKenzie looked like the man in question but at this point he could not be 100% sure (Officer Hoffnecht and Michael Burns: H38-41, 76-77, 1004-06, 1008-09).

Officer Hoffnecht heard a shot and a groan and someone yell, "He shot the cop. He's hurt pretty bad." With that, Hoffnecht and Hayes rushed to the front of the store, enabling Irby to escape. There Police Officer Giglio was lying on the street, foaming at the mouth, mortally wounded, his gun still in his holster. Officers Hays and

* Officer Hayes, called as a defense witness, stated that upon arrival, he observed a piece of clothing bearing a Thelma J.'s label, underneath the store's rear window (H1743-46).

Hoffnecht rushed Officer Giglio to the hospital where he went into cardiac arrest (Officers Hoffnecht and Hays, and Michael Burns: H41-44, 46, 1009, 1746-47).

The Investigation and Apprehension of MacKenzie and Irby

After the shooting, numerous police officers arrived. Detective **Tom Gulla** arrived at about 2:30 to 2:40 a.m. Detective Gulla recovered near the crime scene a bent screwdriver and a can of mace. Detective Gulla also examined Thelma J.'s and noticed that the front door had been pried open. Detective **Conrad Robinson** arrived at about 3:00 a.m. Detective Robinson observed the Cadillac in the driveway. At that time the passenger door was open, but the interior lights of the car were off. Detective Robinson leaned into the car and noticed a 9 millimeter Browning gun and holster in the opened glove compartment. MacKenzie's Florida operator's license was on the front seat and car keys were on the floor on the driver's side (Dets. Gulla and Robinson: H429-30, 816-18, 837).

Detective Gulla interviewed Michael Burns. Burns provided Detective Gulla with a description of the male perpetrator, to wit: white, 5'11" or 6', 145 to 150 lbs., medium build, brown or dirty blond hair worn bowl-shaped, maroon sweater and light pants. Burns was not sure whether the perpetrator was clean shaven or wore a mustache (H1101, 1107). At about 3:30 or 4:00 a.m., Detective Sgt. **Faust** gave Burns, Mackenzie's Florida license which contained MacKenzie's photo.* Burns viewed the photo

* Detective Sgt. Faust (called as a defense witness) stated that he received the license from Detective Ragone (H1671). Detective Ragone (defense witness) stated that he received the license from other police officers who retrieved same from MacKenzie's car (H1726).

for about a minute (H1086) and informed the Nassau Police that that was the man who ran out of the store (Det. Gulla and Michael Burns: H431-34, 498, 508, 511, 515, 1007, 1009-10, 1086-88).

MacKenzie's photo was also exhibited to **Lorraine Mait**, proprietress of Thelma J.'s, who arrived at about 3:00 a.m., finding her store ransacked and numerous articles missing. Mrs. Mait informed the police that on that previous Saturday, at about 2:30 p.m., the man depicted in the photo, MacKenzie, accompanied by a girl (Irby), were in her store. Mrs. Mait related that the female (Irby), wanted to buy some clothing. MacKenzie walked around the store and then entered the bathroom and remained there for some time. Finally MacKenzie left the bathroom and purchased a blouse for Irby. Upon preparing the sales receipt, MacKenzie gave the name "Galgano." The blouse was placed in a yellow Thelma J.'s bag and both defendants left (Lorraine Mait: H879-85).

MacKenzie's photo was enlarged and copies were distributed to various police teams. A mobile police command bus arrived and it became the center of operations. Irby was apprehended at about 4:30 a.m. and brought to the command bus where she was questioned by Chief of Detectives **Curran** and Detective Gulla at about 5:00 a.m. Detective Gulla gave Irby her pre-interrogation warnings which Irby understood. Irby agreed to talk, whereupon Irby confessed to the crime, fully implicating MacKenzie. Irby confirmed Mrs. Mait's statement that she and MacKenzie had been to the store on October 4th. Irby related that during the early morning hours of October 7th, she and MacKenzie returned to the store in MacKenzie's Cadil-

lac. Irby claimed that MacKenzie forced her to participate in the crime. MacKenzie gained entry through the rear window, while she remained outside as a lookout. MacKenzie would bring the merchandise through the bathroom window and she would place same in the car. However, when she saw car headlights (officer Hoffnecht) she hid in the bushes. Upon observing Officer Hoffnecht, Irby met him and gave him the story about looking for a calico cat. Other police arrived. Irby who was facing the rear window, observed MacKenzie at that time, while she was being questioned.

Suddenly Irby heard a shot and MacKenzie yelled that she should run. The police officers left her and she escaped. Irby also informed the police that she and MacKenzie were staying in a motel in the area (Chief Curran and Det. Gulla and Officer Politano: H136, 273-77, 289, 434-39).

The Search for MacKenzie

At the time that Irby was making her revelations, the police ascertained that the motel in question was the Turnpike Motor Inn on Hempstead Turnpike. Detective Robinson and Sergeant **Wagner**, among others, were dispatched to the Turnpike Motor Inn at about 5:00 a.m., to look for MacKenzie. Upon arrival, the police ascertained that MacKenzie was staying in room 7 and they obtained the room key from the clerk. From the outside window, Sergeant Wagner observed that both a light and a T.V. were on. The police thought that MacKenzie might be there. The police entered the room, but found it unoccupied. They remained for no more than a minute or two. The room contained various articles including a car tire and jack.

The police left, but a stakeout unit remained ouside in case MacKenzie returned (Det. Robinson and Det. Sgt. Wagner: H821-25, 864, 866, 1439-41).

Between 9:00 and 10:00 a.m., a police team consisting of Police Officers **Politano, Chotkowski, Crawford** and **Miller,** were directed to search the immediate area in the hope of locating MacKenzie. The police proceeded to 472 Hempstead Avenue, a private residence, about one block from Thelma J.'s. On the grounds was an old garage. The police entered the garage and Police Officers Politano and Chotkowski traversed a ladder up to the loft area. In one corner of the loft was a white canvas tarpaulin. Police Officer Politano removed the tarp and found MacKenzie squatting behind it. MacKenzie volunteered: "I'm sorry, I'm not the one you want. It's Galgano" (H139, 1640).

Police Officer Politano helped MacKenzie up and asked that he identify himself. MacKenzie gave Police Officer Politano his name and Officer Politano informed MacKenzie that he was under arrest and that he had the right to remain silent. An immediate search of MacKenzie's person incident to the arrest uncovered $3,617.27 and a General Motors trunk key. MacKenzie was handcuffed and escorted back to the command bus by the four arresting officers. According to Police Officers Politano and Crawford (a defense witness), when MacKenzie was within 30 to 40 feet of the police bus he said words to the effect, "You are not going to pin this on me. I want a lawyer", or "my lawyer" (H1654, 1428).* (Police Officers Politano,

* Police Officer **Bruce Miller,** one of the arresting officers (called as a defense witness), stated that upon exiting the loft, defendant asked for a lawyer and when they were near the

(footnote continued on next page)

Crawford and Chotkowski: H134-42, 190, 192, 208-16, 221, 230, 260, 1654).

MacKenzie was turned over to Chief Curran, Detective Gulla and Sergeant Wagner at about 10:00 a.m. Lorraine Mait was still present and upon seeing MacKenzie, she recognized him as the individual in her store on October 4th. The arresting officers did not inform their superiors of MacKenzie's request for counsel (H293, 1656). MacKenzie was brought into the bus. MacKenzie was complaining that the police took his money and that the handcuffs were bothering him. Chief Curran informed MacKenzie that if he were willing to act like a gentleman, the handcuffs would be removed. MacKenzie agreed and the handcuffs were taken off. Chief Curran directed Detective Gulla to give MacKenzie the pre-interrogation warnings. Detective Gulla proceeded to give MacKenzie his fourfold *Miranda* warnings slowly and audibly (H1514). Detective Gulla also informed MacKenzie that an attorney would be brought to the bus if he so desired. When asked if he understood, MacKenie replied that he did and he knew his rights and that he had heard the rights before. Thereupon MacKenzie agreed to talk without an attorney present (Police Officer Politano, Chief Curran, Det. Gulla, Sgt. Wagner and Lorraine Mait: H192, 277-81, 309, 439-43, 1443-46).

McKenzie claimed that he and another male, George Galgano, participated in the Thelma J.'s burglary and he

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police bus, defendant remarked that they were not going to pin this rap on him (H1782). Defendant's latter remark was confirmed by Assistant District Attorney **Birnbaum** (a defense witness), who stated that he was standing by the police bus when defendant approached and heard defendant say only that they were not going to pin this rap on him (H1922).

was in the store when the shot rang out. MacKenzie surmised that Galgano shot the cop. When asked to describe Galgano, MacKenzie gave the police a description that matched Detective Gulla. Detective Gulla replied that MacKenzie was describing him.

Chief Curran told MacKenzie that he was lying and that he had evidence to show otherwise. Detective Curran informed MacKenzie that he had eye-witnesses, they had his wife [Irby] who was saying otherwise, that they could show that he was casing the store that Saturday, that they had his car and his gun. Thereupon MacKenzie asked to see his wife, Irby. His request was granted. Irby was brought into the police bus and the two defendants had an emotional reunion. The police overheard Irby say to MacKenzie that she told the police the truth, and that he should do the same.

As soon as Irby was removed and not in response to any questioning, MacKenzie blurted out: "I shot the cop. There was no Galgano. I did not know he was a cop" (H1535, 283, 445).*

MacKenzie wanted to know the charges and Chief Curran answered that he was to be charged with burglary and assault, but that the final charges were up to the District Attorney. Upon hearing this, MacKenzie agreed to make a statement (Chief Curran, Sgt. Wagner and Det. Gulla: H282-83, 319, 346, 365, 444-46, 1446-48, 1517, 1523, 1535).

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* Chief Curran recalled that before MacKenzie saw Irby, he asked about the charges and that he remarked that he was not going for a cop killing (H283). Detective Gulla and Sergeant Wagner recalled that the foregoing occurred after MacKenzie saw Irby and after his volunteered statement (H446, 1535).

Thereupon MacKenzie made an oral statement which was completed at about 11:00 a.m. MacKenzie then agreed to reduce his statement to writing. The written statement was prefaced by the pre-interrogation warnings. The written statement was completed at 12:12 p.m. at which time MacKenzie read and signed the statement. MacKenzie next agreed to give a statement to an assistant district attorney. That Q & A statement, in which MacKenzie was again given his *Miranda* warnings, commenced at 12:55 p.m. and was completed at 1:40 p.m. During this time, no force, threats, coercion or promises were made to induce MacKenzie to make statements (Chief Curran: 684; Sgt. Wagner, Det. Gulla and Donald White: H283-85, 443-58, 587-89, 684, 1447-54).

MacKenzie and Irby were then taken to Police Headquarters for processing. Sergeant Wagner took MacKenzie's pedigree. During processing, Sergeant Wagner asked MacKenzie why he was wearing such a small sweater. MacKenzie replied that the sweater was his wife's. Sergeant Wagner then asked MacKenzie what went wrong. MacKenzie answered that when he initially observed the two police in the rear of the store, he considered shooting both of them, but concluded that it was too risky and decided to escape through the front door (Det. Lenore Behrens and Det. Sgt. Wagner: H1225-28, 1455-56).

Defendant's Case

MacKenzie called several police witnesses in an attempt to establish that he requested counsel upon arrest and that the police had searched his vehicle including the trunk, before the search warrant was obtained. The relevant

testimony has been noted in the foregoing summary of the People's case.*

MacKenzie also called Suffolk County District Court Judge **Henry Richard Brown**, who had represented MacKenzie on prior unrelated criminal matters to show that MacKenzie had an attorney on prior occasions. Parenthetically, the witness was a sitting judge on the date of the crime.**

Finally, MacKenzie called Dr. **John McKnight**, a psychiatrist. McKnight claimed that it was his opinion that when MacKenzie was questioned, he lacked sufficient mental capacity to waive his rights in an intelligent manner. McKnight characterized MacKenzie's waiver in response to questions as a reflex action. However, during the course of pointed cross-examination, McKnight admitted that MacKenzie understood the constitutional rights he was waiving (H1009-10).†

The Decisions of the State Courts

At the conclusion of the Suppression hearing, defendant sought to suppress all statements which were the product of custodial interrogation on the ground that they were obtained in violation of his right to counsel, specifically that upon arrest he requested counsel and when he later confessed, such confession was obtained in the absence of counsel. The County Court denied the motion to suppress

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* H1654, 1726, 1728, 1766, 1773, 1782, 1804, 1807.

** H1831-37.

† H1898-1910.

the statements, concluding that defendant effectively waived his constitutional rights when he spoke to the police. The Court ruled that the right to counsel includes the right to waive counsel and concluded that upon receiving the pre-interrogation warnings, defendant made a valid waiver of constitutional rights, including the right to counsel (Appendix A, pp. 1a-18a).

Upon appeal, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department reversed the judgment of conviction of the County Court and ordered a new trial. The Appellate Division, based upon a prior decision of the New York Court of Appeals, *People* v. *Cunningham,* 49 N.Y.2d 203 (1980), ruled that defendant's statements were inadmissible because they followed a voluntary waiver of constitutional rights that would not be given effect because, the court held, the defendant having requested counsel upon arrest, he would not be permitted to change his mind and submit to questioning in the physical absence of counsel. *People* v. *MacKenzie,* —— A.D.2d ——, 432 N.Y.S.2d 901 (2d Dept. 1980) (Appendix B, pp. 19a-23a).

In the Appellate Division, respondent argued that the *Cunningham* rule abridged an accused's federal constitutional right to proceed *pro se.* We argued that since a state cannot abridge fundamental rights and privileges, *Cunningham* had to be overruled pursuant to the supremacy clause of the federal constitution.

The Appellate Division disagreed. Said the court at 432 N.Y. Supp. 2d 903:

> "We are not swayed by the People's contention that the rule posited in *People* v. *Cunningham, (supra)* interferes with the accused's constitutional right to self-representation (Citation omitted). Under the New York rule, there is no bar to an accused proceeding *pro se* provided there is a knowing and intelligent waiver of the right to be represented by counsel (Citation omitted). However, once an accused has given an indication that he does not wish to proceed without the assistance of counsel that request must be honored before any further custodial interrogation occurs (Citation omitted)."

Petitioner then sought leave to appeal to the New York Court of Appeals. That leave was denied on January 7, 1981 (Appendix C, p. 24a).

Reasons for Granting the Writ

As the suppression hearing record reflects, as defendant was flushed from his hiding place he volunteered: "I'm sorry, I'm not the one you want. It's Galgano" (H139, 1640). He was then arrested, handcuffed and led back to a command bus. Near the bus defendant volunteered that "You are not going to pin this on me. I want a lawyer" (H1654, 1428). Minutes later he was given the warnings as mandated in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Defendant indicated that he understood his rights and was willing to speak to the police in the absence of an attorney. Defendant's desire to speak to the police without counsel was manifest, since what followed was a partially exculpatory statement laying both the onus of the burglary and the shooting of Police Officer Giglio on a third person, George Galgano. After speaking with his

girlfriend, defendant changed his story, admitting that he was the only male involved in the burglary and that he shot Officer Giglio, although he had no idea that the person he fired at was a police officer.

Nisi prius ruled that notwithstanding defendant's initial request for counsel, defendant issued a valid waiver of his constitutional rights when he spoke with the police and all his statements were admissible (Appendix A, pages 13a-15a). *See also People* v. *Bodie,* 16 N.Y.2d 275 (1965); *People* v. *Alexander,* 45 A.D.2d 1023 (2d Dept. 1974), lv to appeal den. (October 24, 1975); *see also Alexander* v. *Smith,* 582 F.2d 272 (2d Cir. 1978). *Cf. People* v. *Gary,* 31 N.Y.2d 68 (1972).

While defendant's state court appeal was pending, the New York Court of Appeals in *People* v. *Cunningham,* 49 N.Y.2d 203 (1980) ruled that once the right to counsel is invoked, a subsequent ". . . uncounseled waiver of a constitutional right will not be deemed voluntary." *Cunningham, supra* at 205. *Cunningham* was applied retroactively to all cases pending direct state appellate review after *Cunningham* was decided. *People* v. *Prince,* 50 N.Y.2d 883 (1980). *Contra Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

Thus the intermediate appellate court, despite other strong independent evidence of defendant's guilt, appeared constrained to reverse the judgment of conviction on the basis of *Cunningham,* since no lawyer was provided when defendant waived his *Miranda* rights and spoke to law enforcement officials. Leave to appeal to the New York

Court of Appeals was denied on January 7, 1981 (Appendix C). Thus all avenues of state court relief have been exhausted. In the state intermediate appeals court, petitioner invited that court to invoke the federal constitution's Supremacy clause and overrule *People* v. *Cunningham, supra,* on the federal ground that *Cunningham* undermined the fundamental federal constitutional right of permitting a person in custody to answer police questions in the absence of counsel if that be his reconsidered voluntary choice. That argument was rejected. *Cunningham* was construed to hold merely that once an accused invokes his right to counsel, that request must be honored before any further custodial interrogation occurs, irrespective of the reconsidered wishes of the person in custody. That determination of state law interferes with the federal constitution's guarantee to *pro se* representation.

The Supremacy Clause of the United States Constitution Requires that New York's *People* v. *Cunningham* Rule Be Declared Invalid and Void

The Sixth Amendment of the Federal Constitution guarantees an individual the right to proceed *pro se* at all critical stages of the prosecution. *Faretta* v. *California,* 422 U.S. 806 (1975); *Carter* v. *Illinois,* 329 U.S. 173 (1946); *Adams* v. *United States ex rel. McCann,* 317 U.S. 269 (1942). This federal right has been made binding on the states through the Fourteenth Amendment, and thus no state may force a lawyer upon an unwilling defendant. *Faretta, supra. People* v. *Cunningham, supra,* 49 N.Y.2d 203 (1980) in interpreting Article I §6 of the New York State Constitution, New York's right to counsel provision, does just that with respect to custodial interrogation, a

critical stage of the proceedings; in essence, once counsel is requested, the individual becomes imprisoned in his constitutional privileges. As a result, the rule of *Cunningham* conflicts with and undermines a federally protected constitutional right. Since the federal constitution is supreme, *Cunningham* must be overruled pursuant to the Supremacy clause of the federal constitution. *Cooper* v. *Aaron,* 358 U.S. 1 (1958); *Henry* v. *Rock Hill,* 376 U.S. 776 (1964).

The People Have Standing

While the right to self-representation is personal, the People here are not asserting MacKenzie's constitutional rights. Rather, we are asserting our standing to attack the federal constitutional validity of the New York's *per se* rule because pursuant to this rule, the People are an adversely affected party litigant. It is well settled that the constitutionality of a state ruling may be asserted only by a litigant who is adversely affected by the state ruling. In this case, the right of the state, a party litigant, to introduce otherwise competent, reliable evidence of guilt has been denied as a result of New York's *per se* rule. Thus the People have standing to raise the question of the federal constitutionality of this state's *per se* rule. *Oregon* v. *Haas,* 420 U.S. 714 (1975); *Chapman* v. *Crane,* 123 U.S. 540 (1887); *Cf. Fare* v. *C.,* 442 U.S. 707 (1979); *North Carolina* v. *Butler,* 441 U.S. 369 (1979).

Constitutional Right to Self-Representation

This Court in *Faretta* held that an accused enjoys the constitutional right to self-representation with respect to his own case. Stated this Court at 834: "Personal liberties are not rooted in the law of averages. The right to

defend is personal. The defendant and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his case . . . counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' (citation omitted)."

In this respect, other courts have recognized and applied logically the constitutional right to self-representation at custodial interrogation, respecting the inestimable worth of free choice as guaranteed by the Bill of Rights. Thus courts have eschewed New York's *per se* no questioning rule once an in custody accused requests counsel, recognizing that the accused has a constitutional right to change his mind and proceed without counsel with respect to stationhouse questioning. *White* v. *Finkbeiner,* 611 F.2d 186 (7th Cir. 1979); *United States* v. *Rodriguez-Gastellum,* 569 F.2d 482 (9th Cir. 1978) (en banc), cert den. 436 U.S. 919 (1978); *United States* v. *Mohabir,* 624 F.2d 1140 (2nd Cir. 1980); *Nash* v. *Estelle,* 597 F.2d 513 (5th Cir. 1979); *United States* v. *Grant,* 549 F.2d 942 (4th Cir. 1977), *cert den.* 432 U.S. 908 (1977); *Cobbs* v. *Robinson,* 528 F.2d 1331 (2d Cir. 1975), *cert den.* 424 U.S. 947 (1976); *Kennedy* v. *Fairman,* 618 F.2d 1248 (7th Cir. 1980); *United States* v. *Hauck,* 586 F.2d 1296 (8th Cir. 1978), *cert den.* 441 U.S. 947 (1979).

As stated in *Carter* v. *Illinois,* 329 U.S. 173, 174-75 (1946): "Neither the historic conception of due process nor the validity it derives from progressive standards of justice denys a person the right . . . to confess guilt. . . . The [federal] constitution does not require that under all

circumstances, counsel be forced upon a defendant." In this regard, *Faretta* emphasizes that the constitutional right to self-representation is paramount, while the right to the assistance of counsel is supplemental, with regard to a criminal proceeding. Indeed, New York in *People* v. *Davis*, 49 N.Y.2d 114 (1979) recognized the paramount right of self-representation with respect to trial, citing *Faretta*. To this end, respectfully, we cannot conceive of a more critical stage of the proceeding than the trial itself. Why counsel in New York, although previously requested, can be subsequently waived in court in the absence of counsel, but no such waiver could be had at the stationhouse, once counsel is requested, defies reason and logic.

The faulty premise underlying *Cunningham*, which makes that case constitutionally offensive, is its holding that once a suspect requests counsel, he has by this request deemed himself conclusively incompetent to decide whether to waive his rights and only an attorney can now make that decision for him. He has irrevocably lost that which our constitution decries cannot be lost: freedom to choose.

The incompetency view was derived from a footnote in Mr. Justice White's concurring opinion in *Michigan* v. *Mosley*, 423 U.S. 96, 110, footnote 2 (1975). However, unlike New York, Mr. Justice White did not hold as a matter of federal law that a subsequent uncounseled waiver of *Miranda* rights was *per se* involuntary. Rather, he stated in that footnote that the waiver may be properly viewed with skepticism. Indeed, Mr. Justice White went on to hold that ". . . unless an individual is incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decision about

his own criminal case. . . . I'm very reluctant to conclude that *Miranda* stands for . . . [the contrary] proposition." *Mosley, supra* at 108-09 (White J. concurring). And, this Court in *Brewer* v. *Williams,* 430 U.S. 387 (1977) explicitly recognized that a request for counsel did not as a matter of federal law preclude a subsequent waiver of that right, provided that the waiver comported with the standards enunciated in *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). Finally in *United States* v. *Henry,* 100 S. Ct. 2183 (1980), this Court recognized that as long as the right to counsel is not interfered with, that right may be validly waived, even in a post-indictment setting. Thus this case comes squarely within existing Supreme Court holdings and related Circuit Court holdings permitting, indeed guaranteeing, the right of the accused to dispense with counsel, although previously requested, for purposes of custodial interrogation.

New York, however, by viewing the suspect as a total incompetent, unable to thereafter voluntarily waive in counsel's absence, has imprisoned the individual in his federal constitutional privileges. Constitutional rights though are personal. The federal constitution recognizes that the individual, not the attorney, is the master. *Faretta, supra. Cunningham* reverses this relationship and in so doing, deprives the individual of his inherent right of free choice as contained in *Faretta,* by precluding him from exercising his change of mind regarding counsel and electing to speak to the authorities without one. The federal constitution guarantees that right to a suspect.

By creating the legal fiction that a suspect is forever incompetent and thus incapable of choosing once he requests counsel upon arrest, New York has forced a lawyer

indelibly upon a suspect. He cannot thereafter elect to dispense with one and speak with the police on his own. By denying, ". . . an accused a choice of procedure in circumstances in which he, though a layman is as capable of making an intelligent choice is to impair the worth of great [federal] constitutional safeguards by treating them as empty verbalisms." *Adams, supra* at 279.

The anticipated retort is that *Cunningham* does not irrevocably muzzle the accused once he requests counsel. But the import of the *Cunningham* rule is to preclude the police from speaking to the accused, even if he later begged them to take his statement, for *Cunningham* admonishes law enforcement to leave the accused alone once he requests counsel. Indeed Cunningham himself, much like defendant, after conferring with his wife, decided to give the police a statement. The Court of Appeals ruled that, consistent with state law, the police could not take Cunningham's statement. The actual and intended effect therefore of the *Cunningham* ruling, is to deter the police from speaking with the accused once counsel is requested, by imposition of the exclusionary rule with guillotine certainty, thus denying the accused his federally guaranteed constitutional right of insisting upon speaking with the police without the assistance of counsel, at the station-house. This case is an apt illustration of the potential consequences of the denial of that federal constitutional right.

The record reflects that while MacKenzie initially requested counsel, albeit upon arrest and not in the context of interrogation, he was quite desirous of speaking with the police in the hope of extricating himself from a police

homicide charge, then a capital offense. That is, MacKenzie, a criminal-law wise defendant, upon receiving the pre-interrogation warnings, made an informed waiver of his rights and told the police that a third person, George Galgano, was the real shooter. While MacKenzie's claim was subsequently checked out and found to be false, what if it were true and the real killer was still at large, still getting away? Further, what if MacKenzie were able to lead the police to the actual murderer, since the crime was still fresh? *Cunningham,* literally applied, would have prevented this discussion and together with the inability to immediately secure counsel, could have ensured the successful getaway of the real murderer. Even more harrowing would have been putting MacKenzie on trial and convicting him for a capital offense he did not commit.*

While the state may afford the accused more federal constitutional protection than the Supreme Court devises, it cannot dilute federal protections and provide less. *Dunaway* v. *New York,* 442 U.S. 200 (1979). Moreover, while the state can impose greater restrictions on the police, they cannot do so at the expense of guaranteed federal constitutional liberties. "By creating an inflexible rule that no . . . waiver can ever suffice, [New York] has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution." *North Carolina* v. *Butler, supra* at p. 376.

* Similarly, there are situations where highly evanescent alibi witnesses may exist, whom the police could locate, but *Cunningham* would insure their permanent loss, if the accused initially requested counsel, since at that point further verbal intercourse with the accused is vigorously proscribed.

As we have demonstrated, the New York courts have encroached and trampled upon the recognized federal constitutional right of self-representation and free choice with respect to stationhouse questioning, which is personal to the accused, by subordinating that precious fundamental right to the supplemental right to counsel, where the accused has made an informed choice to dispense with counsel who is not present or in the case and speak with the police on his own. New York has accomplished this by preordaining the imposition of the exclusionary rule, thus deterring law enforcement from speaking with the accused once he has requested counsel.

Finally, overruling *Cunningham* will not denigrate the right to counsel. For, left intact, is the burden of the state to prove beyond a reasonable doubt that the waiver of Fifth and Sixth Amendment rights with regard to a statement was knowing, intelligent and voluntary. *People* v. *Huntley,* 15 N.Y.2d 72 (1965). And like *Faretta,* those entrusted with making that determination are the courts, not the police or the prosecution. In this case, nisi prius found that the People sustained their reasonable doubt burden with respect to MacKenzie's statements. That finding is amply supported by the record. MacKenzie initially volunteered that a third person was responsible. Then MacKenzie was given his *Miranda* rights. MacKenzie acknowledged his understanding of those rights, indeed he heard them before. MacKenzie then agreed to talk without an attorney. The decision to talk when he was told he may remain silent and that he could have an attorney was an informed choice, which MacKenzie had the constitutional right to make personally. That followed by an intended

exculpatory statement reiterating his previously volunteered statement that while he was involved, Galgano shot the officer, established that MacKenzie's waiver of constitional rights was knowing, intelligent and voluntary. Critically, that short interrogation which produced a reiteration of his concededly admissible volunteered statement then ceased, and a significant intervening event occurred, *i.e.* at MacKenzie's request he met and talked with his girlfriend. Upon speaking with his girlfriend, MacKenzie blurted out his guilt. No questioning produced that statement. Thereupon, MacKenzie again validly waived his rights and confessed, never once requesting counsel. Under these circumstances, the application of *Cunningham's* exclusionary rule to an accused's voluntary and intelligent choice to speak with police in the absence of counsel impermissibly abridges the accused's federal constitutional right to proceed *pro se*.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nassau County

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Of Counsel

APPENDICES

APPENDIX A

Nisi Prius Opinion

COUNTY COURT—NASSAU COUNTY

Present:

Hon. Alphonso M. La Pera
County Judge

Indictment #43878

People of the State of New York

against

John MacKenzie
Defendant

Hon. Dennis Dillon
District Attorney
Nassau County
Mineola, New York

Michael Jay, Esq.
Attorney for Defendant
123-60—83rd Avenue
Kew Gardens, N.Y. 11415

The defendant, John MacKenzie, is under Indictment for the crimes of Murder, Burglary, Grand Larceny, Possession of Burglar's Tools, Possession of a Weapon and Unlawful Possession of Noxious Materials.

A combined Hearing was held immediately prior to trial upon defendant's motion under Article 710 of the Criminal Procedure Law to (a) inquire into the propriety of the identification procedures employed by the police and to suppress the in-court identification by two witnesses; (b) inquire into the voluntariness and admissibility of oral and written statements made by the defendant and to suppress the same; (c) to suppress certain evidence seized by the police prior to the issuance of Search Warrants and to suppress all evidence seized pursuant to the execution of the Warrants and to controvert the Warrants.

Following are the Court's Findings of Fact and Conclusions of Law:

On October 7, 1975, at or about 2:30 a.m., Nassau County Police Officer Richard Hofknecht was on Motor Patrol duty in the area of Locust Street and Hempstead Avenue in West Hempstead. The officer, observing a suspicious car in the rear of Thelma J's Boutique, proceeded into the driveway, shined his spotlight and saw no one in the car. However, he did see an open window in the rear of the store. The patrolman backed his car out of the driveway, called for assistance and stepped out of his car. Michael Burns approached the officer and informed him that someone was banging at the front door of Thelma J's. The officer then looked into the driveway and observed a white female standing near the car in the driveway. Burns was asked to stand at the corner and yell if he saw anybody coming out of the building. Hofknecht then walked to the rear to question the female whom he later identified as Colleen Irby. Officer Hays arrived in a patrol car and Officer Giglio in a blue and orange ambulance which had Nassau County Police Department written on it. Hof-

knecht yelled to Giglio to cover the front and waved to Hayes to come to the rear. While questioning Irby, a shot and groan were heard from the front of the building. Both officers ran to the front and heard someone yell "The cop has been shot" and observed Giglio lying on the sidewalk with a hole in his shirt. Again someone yelled: "He just went around the end of the building." Both officers drove Giglio to Mercy Hospital. Hofknecht then called Headquarters and gave a description of the female.

While Michael Burns was walking along Hempstead Avenue at or about 2:30 a.m., he heard a noise coming from Thelma J's Boutique. When directly across the street, a distance of approximately 50 to 60 feet, he observed the defendant inside the store for a period of about 30 seconds. The defendant was staring directly at him and was pushing and pulling the front door. There was a light directly over the door inside the store at the time Burns made his observations.

Burns saw a police car in the gas station and told the officer that he thought he saw somebody in the clothing store. The officer told him to wait at the corner and yell if anyone came out of the store. An ambulance and a police car arrived; the ambulance was parked two stores away from the boutique; the policeman operating it got out and walked towards Thelma J's.

Burns observed the defendant coming out of the store, staggering and walking away from the store with his back towards him. The street was well lit, there were lights shining from the meat market adjoining the boutique and there was nothing obstructing Burns' view. Burns saw the police officer follow the defendant and then he observed the defendant up against the window with his hands over

his head against the window. Defendant looked back several times. His right hand came down, he turned and fired a shot. The officer fell and the defendant ran.

Burns gave Detective Thomas Gulla a description of the defendant and what he was wearing. While Detective Gulla was interviewing Mr. Burns, Detective Sgt. Faust showed Burns People's Exhibit 17, a Florida driver's license with defendant's photograph on it. He was asked if he recognized the person in the photograph. Burns replied that that was the person who came out of Thelma J's Boutique. Later that morning Burns went to Police Headquarters and assisted an artist in making a composite drawing of the defendant, People's Exhibit 51.

At the Hearing, the witness was asked if he saw anyone in the Courtroom that looked like the person who exited from Thelma J's. Burns was not 100% sure but he indicated the defendant looked like the man.

Detective Gulla, who arrived at the scene at about 2:40 a.m., observed that the front door of Thelma J's was ajar and some pry marks were on the door jam. Walking in the area, he found a bent screwdriver and a cannister of mace and saw the Cadillac parked in the alleyway.

At or about 5 a.m., Colleen Irby was apprehended and brought to the Command Bus which was set up in front of Thelma J's. Detective Gulla advised her of her constitutional rights as mandated by *Miranda* and asked her if she understood, to which she replied "Yes", and when asked if she wanted to speak without an attorney present, she gave an affirmative reply and thereafter recounted the events of that morning.

Approximately at 9 a.m., on October 7th, Officers Barry Crawford, Richard Politano, Bruce Miller and John Chot-

kowski of the Crime Prevention Unit, arrived at the scene of the crime. They were informed that there was a burglary and that a police officer was shot. The officers were given a photograph of John MacKenzie and were told to search the area of the west side of Hempstead Avenue, northbound. At 472 Hempstead Avenue they approached a garage and Politano heard a noise. Upon hearing the noise the second time, he called Officer Chotkowski and informed him he heard some rustling in the loft of the garage. They entered the garage, went up a wooden ladder to the loft and saw something under a canvas. With guns drawn, they pulled the canvas and observed the defendant who stated: "I am sorry, I am not the one you want, it's Galgano." Politano pulled the defendant up and asked him what his name was and what he was doing there. The defendant stated his name was MacKenzie; thereupon Politano advised him that he had a right to remain silent, he was under arrest and was handcuffed. Officers Chotkowski and Crawford searched the defendant and found approximately $3,677.27 in the defendant's pockets. After the search the defendant was escorted down the ladder and they all proceeded towards the Command Bus. No conversation ensued thereafter until about 30 to 40 feet from the Command Bus when the defendant shouted: "I am not the one you want. You are not going to pin this rap on me. I want a lawyer. I want my lawyer." When they arrived at the Command Bus the defendant was turned over to Chief Curran. None of the officers informed the Chief or anyone else of defendant's request for a lawyer. Defendant was taken into the interview room and in the presence of Detectives Gulla and Wagner, Chief Curran asked the defendant whether he wished to talk to him and if he

wanted to act like a gentleman the handcuffs would come off. Gulla then took off the handcuffs and recited the *Miranda* warnings to the defendant by reading from the top half of a card (People's Exhibit 15). Gulla recited: "Before asking you any questions, you should understand you have a right to remain silent and that any statement you may make may be used against you in Court. Also, you have a right to talk to a lawyer before answering any questions or to have a lawyer present at any time. If you cannot afford to hire a lawyer, one will be furnished for you. If you wish, you have the right to keep silent until you have a chance to talk to a lawyer. Do you understand?" To which the defendant replied "Yes". Curran then went on and said: "Now that you understand, are you willing to answer questions before talking with a lawyer or having one present?" and the defendant stated "Yes, I know my rights". After the rights were read, Detective Gulla dated the card and he, Detective Wagner and the defendant all signed the card. The defendant then gave the officers a statement. Chief Curran told him the story did not match up with the facts as they knew them. MacKenzie asked what the police had on him. He was informed there were witnesses, they had his car, the gun, that Colleen Irby told the story differently and that they knew he cased Thelma J's on Saturday. MacKenzie asked if he could talk to Colleen Irby and Chief Curran arranged for her to be brought into the bus. When they saw each other they sat down, hugged and kissed and spoke together for about 10 to 15 minutes, during which time she informed the defendant that she had told the truth. After Irby left, the defendant orally gave details implicating himself in the burglary and shooting. After making the oral statement,

Gulla asked the defendant if he was willing to give that statement again while Detective Gulla took it down in writing. Gulla again produced the card (People's Exhibit 15A), he informed MacKenzie that he was going to take a statement from him, at which time he would include the advisements of his rights as far as a written statement was concerned. Gulla read from the card, stating: "I have the right to remain silent and anything I say may be used against me in Court. I have been told that I have the right to talk to a lawyer before answering any questions or have an attorney present any time. Further, if I cannot afford an attorney, one will be furnished for me and I have the right to remain silent until I have had the chance to speak to an attorney. I understand my rights and make the following statement freely and voluntarily and willing to give the statement without speaking to an attorney or having one present."

After reading the defendant the rights, in the first person, Gulla dated the card and the defendant, Gulla and Wagner signed it. The Detective then asked questions and put down the defendant's response in narrative form. This was completed at or about 12:12 p.m. The six-page statement (People's Exhibit 46) was read by the defendant and he made a correction on page 3 before signing. Gulla and Wagner also signed the statement. Defendant was given a package of Winston cigarettes and coffee. Shortly thereafter Gulla asked the defendant if he would be willing to speak to an Assistant District Attorney with reference to the case; the defendant agreed.

Assistant District Attorney Barry Grennan and Donald White, a confidential reporter, entered the interview room and the Assistant introduced himself, asked the defendant

his name and informed him that the reporter was going to take down the conversation that would ensue. The defendant nodded his head in an affirmative fashion and when he asked the defendant if he was willing to talk to him, the defendant replied "Yeah". He then asked the defendant: "Did the detectives advise you that you had a right to remain silent?" and received a reply "Yes, Sir". He asked the defendant "Did they advise you that any statements that you make could be and will be used against you in Court?" He replied: "Yes, Sir". He asked defendant "Did they tell you that you have the right to have an attorney present?" His reply was "Yes, Sir". "Now or at any time at all?" The defendant replied "They told me if I could not afford one I could have one appointed." When asked whether he understood all those things that the offiers told him, he replied "Yeah". He said he understood all those things and was willing to talk. He informed the Assistant that he had signed People's Exhibits 15 and 15A as well as the written statement.

Before questioning the defendant, Grennan gave the defendant his constitutional rights. The defendant stated he understood the rights and was willing to talk to Mr. Grennan. Grennan questioned the defendant from about 12:45 p.m. until 1:40 p.m. while Mr. White recorded the same on his stenotype machine. Mr. White subsequently transcribed his stenographic minutes into typewritten form (People's Exhibit 36).

Grennan asked if the police could search the Cadillac and the defendant consented.

During the interrogation defendant was scared but alert, articulate and his responses were directed to the questions. No promises were made to induce the defendant to talk to

the Assistant District Attorney. After the interrogation was completed, Detectives Gulla and Wagner took the defendant to Police Headquarters. While defendant was being processed, Detective Wagner asked MacKenzie what happened and the defendant made some inculpating statements.

Lorraine Mait, co-owner of Thelma J's, identified the defendant in the courtroom as the man she saw in her store on October 4th with Colleen Irby. On that date they remained in the store for approximately 15 to 30 minutes, the defendant walked around and used the bathroom during that time. A blouse (People's Exhibit 49A) was purchased and the defendant asked to change some small bills for big ones.

At or about 3:15 a.m. of the morning of the shooting, Mrs. Mait arrived at the scene and while in the Command Bus Detective Wagner showed the Florida license and asked if she knew the person in the photograph. She informed the detective that the man had been in her store on the preceding Saturday. Upon leaving the bus, Mrs. Mait saw Colleen Irby being brought into the bus and informed the detective that she was the woman in the store with the defendant. While in the butcher shop adjoining Thelma J's that morning, she observed the defendant handcuffed being brought into the Bus.

Detective Conrad Robinson arrived at the scene around 3 a.m. on October 7th, was told of the shooting and burglary. He observed Officers Cunningham and Iger putting a spot light on a dark brown Cadillac in the rear of Thelma J's. The interior lights were out and the passenger door was open. Looking into the car with the use of a flashlight he saw a 9 mm automatic gun in a basket weave-type holster (People's Exhibit 39) in the glove compartment, and a

driver's license (People's Exhibit 17) on the front seat sticking out from underneath a seat belt buckle. He took the name and address off the license and wrote it on a pad and informed Officers Cunningham and Iger to watch the car and not to let anyone touch it. He then called the Nassau County Identification Section and the New York City Identification Section and the 112th Precinct in New York City to find out if anyone with the name MacKenzie had been arrested, whether there may have been a record with a photograph.

At about 5 a.m., Detectives Robinson, VanNostrand, Wagner and Captain Meddis, and a detail of officers, went to the Hempstead Turnpike Motor Inn for the purpose of arresting John MacKenzie. Wagner checked the register with the night clerk and saw that Room 7 was rented to the defendant. The key for the room was obtained from the clerk. The officers observed the lights on in Room 7 and a TV set playing. They entered the room which was unoccupied. The officers observed an auto jack, a tire, tripod, license plates and clothing. Nothing was touched. The officers left while two detectives remained in a parked car opposite the room watching for MacKenzie.

At Police Headquarters Colleen Irby expressed her concern to Detective Lenora Behrens over her personal effects in the motel room, especially her ring and some camera equipment. Behrens asked her if she would give a consent to search Room 7 and to safeguard her property; Irby agreed. She obtained a consent-search form (People's Exhibit 62). Irby read it and then the Detective read it to her and both signed the form.

It appears that sometime prior to noon, Officer Hugo VanWalsleben of the Latent Fingerprint Section of the

Police Department, seized a 9 mm Browning automatic pistol in a holster with five rounds of ammunition (People's Exhibit 39) from the locked glove compartment of the Cadillac at Police Headquarters. He dusted the car for fingerprints and was present that evening when the trunk of the car was opened and dusted the trunk.

Detective Behrens left Police Headquarters, went to the District Attorney's Office, met Detective Acquasanta and Sergeant Schlichtig, and assisted in the preparation of two Search Warrants. At about 6 that evening, she and Acquasanta appeared before the Hon. Raymond Wilkes who signed the Warrants.

The supporting affidavit (People's Exhibit 58) reflects that Behrens participated in the investigation of an attempted murder of a police officer who was investigating a possible burglary at Thelma J's Boutique. That the affiant was present when Colleen Irby gave a statement as to the events leading up to and surrounding the burglary and shooting. Irby told the affiant that the defendant had a pair of wire cutters, screwdriver and other tools under the front seat of his 1969 dark drown Cadillac, New York registration No. YHW 110, and she placed merchandise stolen from Thelma J's Boutique into the car. The affiant also informed the Court that the Cadillac which the defendant drove to the rear of Thelma J's Boutique was found in the rear alleyway behind the boutique at the time of the shooting and then taken to Police Headquarters.

Detective Acquasanta in his supporting affidavit, indicated that he interviewed one of the owners of Thelma J's Boutique who stated that between $100 and $150 in cash and one check were missing from the store in addition to blouses, pant suits, coats, handbags and an adding machine.

The supporting affidavit of Behrens, annexed to the Search Warrant (People's Exhibit 50), authorizing the search of Room #7 of the Turnpike Motor Inn, reflects similar facts as set forth in her affidavit annexed to People's Exhibit 58. In addition, Irby informed her that she and the defendant registered in a motel on Hempstead Turnpike located near Belmont Racetrack. That the affiant determined that the motel was the Turnpike Motor Inn located at 434 Hempstead Turnpike, West Hempstead, and that Irby and the defendant were registered in Room #7. The supporting affidavit indicates Irby informed the affiant that she purchased a beige blouse with brown butterflies from Thelma J's.

The affiant also informed the Court that three hours and 25 minutes lapsed from the time Giglio was shot and the time that the stake-out was placed at the motel, which is approximately a 15 minute walk from the site of the shooting, giving the defendant ample opportunity to return to the motel room and secret evidence therein.

Detective Acquasanta's supporting affidavit set forth the same facts as in his affidavit annexed to People's Exhibit 58. Colleen Irby's statement was also annexed to the Search Warrant.

Detective Acquasanta was given the Warrant pertaining to the motel room and arrived at the motel at about 6:30 in the evening. He seized all the items listed in the Return annexed to the People's Exhibit 50.

Detective Behrens went to Police Headquarters, Building E, with the Search Warrant, covering the Cadillac, at which time Detective Aufrecht opened the trunk with a key and observed women's clothing, which were removed from the trunk and an inventory was taken. Under the clothing

he found a typewriter and an adding machine (People's Exhibits 67 and 68 respectively). Detective VanWalsleben retrieved a record book, a screwdriver and a bottle of vitamins from the interior of the car. There was no spare tire or jack in the trunk. The items taken from the automobile are listed in the Return attached to People's Exhibit 58.

On October 31, 1975, Detective Gulla appeared before the Hon. Raymond Wilkes with a Search Warrant. The Detective's supporting affidavit indicated that defendant was wearing sneakers, a maroon sweater and dungarees at the time of the shooting and the affiant had probable cause to believe that an analysis of the clothing would tend to connect the defendant with the commission of the crime. The Warrant was signed and the Detective seized the items belonging to the defendant from the Property Clerk at the Nassau County Correctional Facility.

It was the opinion of Dr. John McKnight that the defendant lacked capacity to fully employ his intellect and knowingly and intelligently to say anything in the Command Bus at 11 a.m. due to his mental condition.

Based upon a careful consideration of all of the evidence in this case, the Court rejects Dr. McKnight's testimony.

The Court finds that Michael Burns, at the time of the incident, had ample opportunity to and did in fact observe the defendant for sufficient time to familiarize himself with his physical appearance.

The Court further finds that Lorraine Mait had ample opportunity to and did in fact observe the defendant at close range in her store on October 4th for sufficient time to familiarize herself with his physical appearance.

The Court further finds that the People have proven, by clear and convincing evidence, that Michael Burns' and

Lorraine Mait's in-court identification made in the course of this Hearing, was based on his visual observations of the defendant at the time of the incident in West Hempstead, and her visual observations of the defendant at Thelma J's Boutique, and were not tainted and influenced by their viewing of the photograph on the Florida license. *People* v. *Brown,* 20 NY 2d 238.

The Court further finds that the viewing of the photograph under the circumstances revealed in this case was not impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons* v. *U.S.,* 390 U.S. 377.

The Court finds that the defendant requested an attorney at the time he was being escorted from the garage to the Command Bus, that none was furnished him and he was not interrogated until the full warnings were given in the interview room of the Command Bus. At that time the defendant waived the right to have counsel present. The right to counsel also imports the right to refuse counsel and the defendant effectively waived his right to counsel. *People* v. *Bodie,* 16 NY 2d 275. In *Miranda* v. *Arizona,* 384 US 436, 479, the highest tribunal of this land stated:

> "After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or to make a statement."

The Court finds, after a review of the testimony of the various witnesses and an examination of the statements, contrary to the psychiatric testimony, that the defendant did have the capacity to fully employ his intellect and did knowingly and intelligently make statements to the police at the time he was apprehended.

The statements made by the defendant were intelligent, responsive, clear, rational and gave a coherent account of his activities prior to, during and after the commission of the crime. There is no evidence that defendant's ability to perceive, recall and relate were impaired. The interrogating officers had no difficulty in communicating with the defendant or the defendant with them. *People* v. *Daugherty,* 32 AD 2d 573(2).

The Court finds that the record fails to substantiate the defendant's lack of understanding of the meaning of his statement or the meaning of the *Miranda* warnings so as to exclude the statements made herein. The defendant was in possession of his faculties and a knowing and intelligent waiver ensued followed closely by a statement. Cf. *People* v. *William, O.,* 59 Misc. 2d 358 and *People* v. *Irwin R.,* 58 Misc. 2d 13.

The Court finds, beyond a reasonable doubt, that the *Miranda* warnings were fully and clearly given by Detective Gulla and the Assistant District Attorney Grennan, were understood by the defendant and the defendant knowingly, intelligently and voluntarily waived his constitutional rights. The People have met the heavy burden of waiver. *Johnson* v. *Zerbst,* 304 US 458.

The Court also finds, beyond a reasonable doubt, from the totality of the circumstances, that the oral and written statements made by the defendant were free of any taint or impropriety and were not induced by force, fear, coercion, promise or any improper methods and that they were voluntary in all respects.

The Court finds that the police, at or about 5 a.m., prior to going to the Turnpike Motor Inn, had reasonable cause to believe that the defendant committed a crime and that

the defendant would be present in Room #7 of the Turnpike Motor Inn.

The Court concludes since the police had probable cause to arrest the defendant, they were justified in entering the motor room without an arrest warrant or search warrant. *People* v. *Lee,* 78 Misc 2d 1020 (CPL 140.15 subd. 4)

The Court finds, beyond a reasonable doubt, that Colleen Irby freely and intelligently consented to the search of Room #7 at the Turnpike Motor Inn and her written consent was not induced by force, fear, coercion, promises or any improper methods. *Amos* v. *U.S.,* 255 U.S. 313; *Judd* v. *U.S.,* 190 F 2d 649; *U.S.* v. *Matlock,* 94 S.Ct. 988; *People* v. *Carter,* 30 NY 2d 279.

The Court, after reviewing the Search Warrant and the affidavits in support thereof, People's Exhibit 50, finds and concludes that the facts set forth therein sustain the issuing Judge's findings of probable cause.

The Court concludes that the entry into Room #7 and the seizure of the items therein by Detective Acquasanta was valid pursuant to the issued Search Warrant and consent.

Under the totality of the circumstances, it was entirely reasonable for the officers to conclude that the 1969 Cadillac probably contained contraband and was an instrumentality of the crime that was perpetrated and contained objects which offend against the law.

The police had a right and duty to search the "crime scene" which included the 1969 Cadillac. *People* v. *Neulist,* 43 AD 2d 150. The search of the automobile at the scene and the seizure of the Florida license (People's Exhibit 17) was not only reasonable but mandatory on police investigating crimes involving public safety and the lives

and physical welfare of victims. *People* v. *Singleteary,* 35 NY 2d 528. In addition, the police were justified in seizing the 9 mm Browning automatic pistol (People's Exhibit 39) at Police Headquarters. *Chambers* v. *Maroney,* 399 US 216.

The Court finds that the defendant freely and intelligently consented to a search of the car and that his consent was not induced by force, fear, coercion, promise or any improper methods. *Amos* v. *U.S.;* supra; *Judd* v. *U.S.;* supra; *People* v. *Lane,* 10 NY 2d 347.

The Court further finds and concludes, after reviewing the Search Warrant and affidavits in support thereof (People's Exhibit 58) that the facts set forth therein sustain the issuing Judge's findings of probable cause.

The Court concludes that seizure of the items from the car was valid pursuant to the issued Search Warrant and consent.

This Court, after reviewing the Search Warrant and Affidavit in support thereof (People's Exhibit 20), finds and concludes that the facts set forth therein sustain the issuing Judge's findings of probable cause.

This Court concludes that the seizure of the sneakers, maroon sweater and dungarees from the Property Clerk of Nassau County Correctional Facility, was valid and proper.

Based on the foregoing, it is, therefore,

ORDERED, that the application of the defendant to suppress the in-court identification by Michael Burns and Lorraine Mait, is in all respects denied, and it is further

ORDERED, that the oral and written statements made by the defendant to law enforcement officials, may be admissible on the trial of this Indictment, and it is further

ORDERED, that the application of the defendant to suppress the physical evidence and to controvert the Search Warrants, are in all respects denied, and it is further

ORDERED, that there will be no publication of this decision or any part thereof, prior to this case and the case of the co-defendant being submitted to the Jury or until the Indictments are otherwise disposed of.

Enter

HON. ALPHONSO LA PERA
J.C.C.

GRANTED
Dated: July 7, 1976.
HAROLD W. MCCONNELL
Clerk

APPENDIX B

Appellate Division Opinion

LEON D. LAZER, J.P.
GUY J. MANGANO
FRANK A. GULOTTA
JOHN P. COHALAN, JR., JJ.

—— AD2d ——

A—October 20, 1980

(Ind. No. 43878)

1940 E

The People, etc.,

Respondent,

v

John MacKenzie,

Appellant.

Harry Peltz, Jr. P.C., Jericho, N.Y., for appellant and appellant *pro se.*

Denis Dillon, District Attorney, Mineola, N.Y. (Martin I. Saperstein and William C. Donnino of counsel), for respondent.

Appeal by defendant from a judgment of the County Court, Nassau County (LAPERA, J.), rendered September 16, 1976, convicting him of murder in the second degree (felony murder), manslaughter in the first degree, burglary in the second degree, grand larceny in the second degree, criminal

possession of a weapon in the third degree, possession of burglar's tools and unlawful possession of noxious material, upon a jury verdict, and imposing sentence.

Judgment unanimously reversed, on the law, and new trial ordered. The facts have not been considered.

On the morning of October 7, 1975, at approximately 2:30 A.M., the Nassau County Police observed a suspicious looking car parked behind a clothing store on Hempstead Avenue, West Hempstead. Upon investigation, it was discovered that the rear window of the premises was open. A bystander who had heard noises emanating from the premises and observed, for approximately 20 to 30 seconds, a man attempting to break out, went to the rear and informed the officers of what he saw. Thereupon, one of the officers, Matthew Giglio, was dispatched to cover the front of the store. A man emerged from the front of the store and, upon being confronted by Officer Giglio, turned and fired a shot, which eventually proved fatal to Giglio.

Meanwhile, the officers had apprehended a women, Colleen Irby, behind the store, and were questioning her when the shot rang out. She escaped when the officers ran to the front, but was later apprehended. It was subsequently ascertained that she was defendant's wife. The first bystander, who had been joined by another individual, saw the shooting, and they both gave descriptions of the suspect to the police. A search of the car parked behind the clothing store revealed, *inter alia,* defendant's driver's license. Approximately seven hours later, a team of police, conducting a search of the immediate area, found defendant hiding under a tarpaulin in the loft of a private garage. Upon discovery, defendant volunteered, "I'm sorry. I'm not the one you want. It's Gargano [*sic*]."

After ascertaining his identity, defendant was informed that he was under arrest and given his *Miranda* warnings. While being escorted to the "command post" which had been set up at the scene of the crime, defendant stated, "I want a lawyer." He was then turned over to detectives for questioning. Prior to interrogation, he was again given his *Miranda* warnings and asked if he understood them. He replied that he did. Thereupon, he agreed to answer questions without having an attorney present.

Defendant stated that he participated in the burglary but that he was accompanied by another individual, Galgano. He contended that he was in the store when he heard a shot, and he presumed that his accomplice had shot the officer.

One of the detectives informed defendant that they knew he was lying. He was told that they had eyewitnesses, his car, his gun, and that his wife had told a different story. Defendant was then permitted a reunion with his wife who told him, in the presence of the police, that she had told the truth and he should do the same.

Defendant then stated, "I shot the guy. I didn't know it [*sic*] was a cop. There was no Galgano there." He then agreed to make an oral statement. This was reduced to a written statement, which was preceded by *Miranda* warnings. He also gave a statement to an Assistant District Attorney, again prefaced by *Miranda* warnings, and made inculpatory remarks to an officer during processing.

All of these statements were ruled admissible following a pretrial hearing.

It is undisputed that defendant asked for an attorney prior to being turned over to the detectives for interrogation. It is clear that once an accused invokes his right to counsel any purported waiver of that right in the absence of counsel is ineffective, and any statements in response to custodial interrogations uttered in the absence of counsel are inadmissible at trial (*People* v *Cunningham,* 49 NY2d 203). That rule has been applied retroactively to cases, such as the one at bar, pending at the date of the decision in *People* v *Cunningham* (*People* v *Prince,* 50 NY2d 883; *People* v *Gordon,* —— AD2d —— [2d Dept., July 28, 1980]). Although defendant's statements uttered prior to his request for counsel were spontaneous and therefore admissible (see *People* v. *Rogers,* 48 NY2d 167; *People* v. *Kaye,* 25 NY2d 139), we find that all of his subsequent statements, both oral and written, were the product of custodial interrogation, and taken in violation of his right to counsel (see *People* v *Cunningham, supra; People* v *Buxton,* 44 NY2d 33).

We are not swayed by the People's contention that the rule posited in *People* v *Cunningham* (*supra*) interferes with an accused constitutional right to self-representation (see *Faretta* v *California,* 422 US 806). Under the New York rule, there is no bar to an accused proceeding *pro se* provided there is a knowing and intelligent waiver of the right to be represented by counsel (*Miranda* v *Arizona,* 384 US 436). However, once an accused has given an indication that he does not wish to proceed without the assistance of counsel that request must be honored before any further custodial interrogation occurs (*People* v *Cunningham, supra*).

Neither are we convinced that the admission of defendant's statements at trial was harmless error. A constitutional error, such as this, may be harmless only there is no reasonable possibility that the erroneously admitted evidence contributed to the conviction, that is if it is harmless beyond a reasonable doubt (*Chapman* v *California,* 386 US 18, 22-24; *Fahy* v *Connecticut,* 375 US 85, 86; *People* v *Jones,* 47 NY2d 528; *People* v *Almestica,* 42 NY2d 222).

While the other evidence of defendant's guilt was strong, including the testimony of two eyewitnesses (*People* v *Braithwaite,* 76 AD2d 931), the nature of the statements admitted, full confessions, renders it very difficult to exclude the possibility that the statements contributed to the finding of guilt.

Accordingly, a new trial is necessary.

As the People have conceded that the suppression of defendant's confessions would deprive them of any evidentiary basis for admitting the can of mace received into evidence at the first trial at any subsequent trial, it is unnecessary for us to pass separately upon that issue. We would note, however, that the hearsay testimony of Detective Gulla regarding certain statements allegedly made to him by the defendant's wife (Colleen Irby) was improperly admitted to establish the defendant's ownership of certain items which had been recovered by the police during the course of their investigation.

We have considered defendant's remaining contentions and find them to be lacking in merit.

Lazar, J.P., Mangano, Gulotta and Cohalan, JJ., concur.

APPENDIX C

Certificate Denying Leave

STATE OF NEW YORK
COURT OF APPEALS

Before: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Appellant

against

JOHN MACKENZIE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
January 7, 1981

/s/ SOL WACHTLER
Associate Judge

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* Descriptian of Order: Judgment of County Court, Nassau, September 16, 1976; reversed, on the law, new trial ordered by Appellate Division, Second Department, November 17, 1980.